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No. 228

In The
Supreme Court of the United States
OCTOBER TERM, 1964

WAVERLY C. BROADWELL and
NANCY BROADWELL, his wife,
and DOHN BROADWELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Waverly C. Broadwell and Nancy Broadwell, his wife, and Dohn Broadwell, your petitioners, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cases on March 8, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, Appendix A, *infra*, is reported at 343 F. 2d 470 (1965). The opinion of the District Court for the Eastern District of North Carolina, (R, pp. App. 25 - 29) is reported at 234 F. Supp. 17 (1964).

JURISDICTION

These actions were consolidated at both the District Court and Court of Appeals levels. On September 21, 1964 the District Court judge who heard the case rendered his decision and judgment against petitioners was entered on September 23, 1964. (R. App. 29) A notice of appeal was filed on October 29, 1964 to the Court of Appeals for the Fourth Circuit which heard the case on March 3, 1965. The Court of Appeals handed down its decision on March 8, 1965 affirming the District Court and entered its judgment on March 8, 1965. This Court, therefore, has jurisdiction under 28 U. S. Code Sec.1254(1).

QUESTIONS PRESENTED

I.

(A.) Whether the tax assessment establishes only a *prima facie* case of liability against the petitioners so as to allow an adjudication of the facts upon which it is based under the specific permission of 28 U. S. Code Sec.2410 (a) to institute a quiet title suit against the respondent?

(B.) Whether suits to remove the cloud of a federal tax lien against the petitioners' title are suits to restrain the collection of the tax barred by the provisions of Sec. 7421 of the Internal Revenue Code of 1954?

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(1)* "R" refers to the appendix as reproduced for the Court of Appeals; besides the copy included in the certified record, petitioners have filed nine copies thereof for this Court.

(C.) Whether the actions to quiet title to petitioners' property are actions for a declaratory judgment with respect to federal taxes which are barred by the provisions of Sec. 2201 of Title 28 of the U. S. Code?

II.

(A.) Whether in an action to quiet title or remove a cloud on title from petitioners' property, the District Court may grant a preliminary injunction against the respondent in order to maintain the *status quo* pending a determination of the principal action?

(B.) Whether the North Carolina *lis pendens* statute, N. C. G. S. Sec. 1-116, affords the petitioners the protection essential to maintenance of *status quo*?

(C.) Whether equitable intervention by way of a preliminary injunction against the respondent is immediately necessary to maintain the *status quo*?

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix B, *infra:* Sections 6321, 6322, 7421 and 7424 of the Internal Revenue Code of 1954 (Title 26, U. S. Code); Sections 1340, 1964, 2201, and 2410 of Title 28, U. S. Code; and Section 1-116 of the North Carolina General Statutes (1963 Supp.).

STATEMENT

These cases originated in the U. S. District Court for the Eastern District of North Carolina by filing verified complaints under 28 U. S. Code, Sec. 2410(a) to remove the cloud of tax liens on title to the property of the petitioners. (R. App. 1, 9, 13, and 21) The liens arose, pursuant to the provisions of Sec. 6321 and 6322 of the Internal Revenue Code of 1954, by reason of a deficiency income tax assessment against the petitioners for the year 1959, which the petitioners contend are arbitrary, capricious, illegal, and erroneous. Thereafter, the petitioners filed motions for preliminary injunction incidental to the suits to quiet title to maintain *status quo*. The petitioners also filed supporting

affidavits to show the ownership of property in addition to that placed in court custody by the complaints. The respondent was threatening a levy and sale of such property to satisfy the liens in issue. Such sales would render the principal actions moot.

The respondent filed motions to dismiss for failure to state a claim upon which relief can be granted for lack of jurisdiction of the subject matter because of Sec. 7421 (a) of the Internal Revenue Code of 1954 and Sec. 2201 of Title 28 of the United States Code and for lack of jurisdiction over the United States because of sovereign immunity. (R, App. 24) Respondent also filed motions in opposition to petitioners motions for preliminary injunction. (R, App. 25) The motions were heard on August 5, 1964.

On September 14, 1964, the District Court filed its consolidated opinion and on September 23, 1964, filed judgments denying motions of the petitioners for preliminary injunction and allowing the respondent's motions to dismiss. (R. App. 25)

The Court of Appeals for the Fourth Circuit affirmed, holding (1) that 28 U. S. Code, Sec.2410 is not available for the purpose for which it is now invoked, and (2) that petitioners have not shown "the existence of special and extraordinary circumstances" warranting resort to a court of equity to contest the taxes in face of the prohibitions of 26 U. S. Code, Sec.7421(a) and 7422.

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict on a main point of this case between the Court of Appeals for the Fifth Circuit in its decision of *U. S. v. Morrison*, 247 F. 2d 293 (1951) and the decisions of the First (*Remus v. U. S.*, 273 F. 2d 293 (1960), Second (*Falik v. U. S.*, 343 F. 2d 38 (1965)), Ninth (*Wells v. Long*, 162 F. 2d 842 (1947).) and now the Fourth Circuit Courts of Appeals.

The Fifth Circuit, in *Morrison, supra*, held that

28 U. S. Code, Sec. 2410 is a grant of jurisdiction to the district court of full equity powers to dispose of an action to quiet title from a federal tax lien. This grant of jurisdiction is complete in and of itself and the district court need not rely on any provision of the Internal Revenue Code to grant to that court jurisdiction to dispose of the type of action here involved. The First, Second and Ninth Circuit Courts of Appeal have stated that Sec. 2410 merely acts as a waiver of sovereign immunity and must look to an independent statute for its jurisdictional requirement. This conflict of decisions between the Courts of Appeal should be resolved.

2. The decision below also conflicts with this Court's decisions in *Clinkenbeard v. U. S.*, 21 Wall. 65, 88 U. S. 65, 22 L.Ed. 477 (1874), and *U. S. v. Rindskopf*, 15 Otto 418, 105, U. S. 418, 26 L.Ed. 1131 (1882), and the Second Circuit Court of Appeals' decision in *U. S. v. O'Connor*, 291 F. 2d 520 (1951). This Court's decisions and the Second Circuit's opinion in *U. S. v. O'Connor, supra*, held that a tax assessment is not conclusive but only a *prima facie* case of liability and, therefore, subject to adjudication when such assessment is illegal and cannot form the basis of an action at law for the collection of the tax. The decision below is based on the erroneous premise that a tax assessment has the conclusive effect of a judgment and, therefore, inquiry may not be made into the merits of the assessment under the provisions of 28 U. S. Code, Sec.2410.

3. The questions presented are of importance in the administration of the federal tax laws.

Settlement of the question by this Court is in the public interest, for it will determine whether persons in the same situation as the petitioners here will be able to bring an action to quiet title against the United States under 28 U. S. Code, Sec. 2410 when a federal tax lien has been levied against their property.

The decision below and the Second Circuit in *Falik v. U. S., supra,* have interpreted 28 U. S. Code, Sec.2410 as allowing jurisdiction only in an action to quiet title brought against the United States by a third party who has an interest in the property subject to a federal tax lien. As of the date of this petition, no Court of Appeals has directly decided the question in favor of a taxpayer bringing such an action to quiet title.

The statute, however, is plain and unambiguous, and thus there is no room for the construction that actions under Section 2410 can only be brought by third parties. The Ninth Circuit has indicated its disapproval of this restriction on such actions in *U. S. v. Coson,* 286 F. 2d 453 (9th Cir. 1961). Until there is a final determination by this Court, the taxpaying public will not have a definitive answer to this issue.

4. The Court of Appeals, in affirming the district court, erred in that they have in effect read into the requirements of 28 U. S. Code, Sec.2410 the requirement that the United States can only be sued, without its consent, under this provision when such action is brought by a third party. A taxpayer against whom the United States has asserted a lien against his property cannot, under this decision, bring an action under that section against the United States. Upon a reading of Sec. 2410, however, there appears no requirement that the action contemplated therein be limited to those brought by a third party rather than the taxpayer whose property is subject to a federal tax lien.

The Court of Appeals also erred in basing its decision on the erroneous premise that a tax assessment has the effect of a judgment. The reliance of the court on *Pipola v. Chicco,* 274 F. 2d 909 (2d Cir. 1960) and *Quinn et al. v. Hook,* 231 F. Supp. 718 (E. D. Pa. 1964), aff'd. 341 F. 2d 920 (3d Cir. 1965) is misplaced since they are based on reasoning contrary to the decisions of this court in *Clinkenbeard, supra,* and *Rindskopf, supra.*

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Fourth Circuit in the instant case raises a question of general importance in the administration of the tax laws which should be reviewed by this Court, especially since there is a conflict of decisions as to the interpretation of the statute involved and as to the effect of a tax assessment.

The decision below is palpably erroneous since it reads into 28 U. S. Code, Sec.2410 a restriction that the statute does not encompass.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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